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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY FLORES, Defendant and Appellant.	B212564 (Los Angeles County Super. Ct. No. BA324964)

APPEAL from a judgment of the Superior Court of Los Angeles County, Luis A. Lavin, Judge. Affirmed.

Law Offices of Pamela J. Voich and Pamela J. Voich, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec and Robert S. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant, Anthony Flores, appeals after a jury convicted him of one count of carjacking in violation of Penal Code[1] section 215, subdivision (a). Defendant admitted allegations concerning two prior robbery convictions (§ 211) within the meaning of sections 667, subdivisions (b) through (i), 1170.12 and 667, subdivision (a)(1) and he served two prior separate prison terms within the meaning of section 667.5, subdivision (b). On defendant's motion, the trial court struck one prior conviction within the meaning of sections 667, subdivisions (b) through (i) and 1170.12. The trial court also struck the two prior prison term enhancements. Defendant was sentenced to 20 years in state prison. He received credit for 517 days in presentence custody plus 77 days of conduct credit for a total presentence custody credit of 594 days. He was ordered to pay: a $200 restitution fine (§ 1202.4, subd. (b)); a $200 parole revocation restitution fine (§ 1202.45); and a $20 court security fee. (§ 1465.8, subd. (a)(1).) Defendant's new trial motion, brought on juror misconduct grounds, was denied.

II. BACKGROUND

A. The Trial

1. Prosecution evidence

The evidence at trial was as follows. On June 27, 2007, at about 3 p.m., Eriko Okusa was with her friend Ryoko Ishimoto at a bank. Ms. Okusa was sitting in the front passenger seat of Ms. Ishimoto's parked van. Ms. Okusa was reading a book. Ms. Ishimoto had gone inside the bank. The engine was running. All of a sudden, defendant opened the driver's door and sat down inside the van. Defendant tried to start the engine even though it was already running. Defendant turned the key three or four times. His

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[1] All further statutory references are to the Penal Code except where otherwise noted.

forehead was sweating, he was in a great hurry and appeared possibly to be agitated. Ms. Okusa, who was afraid, thought defendant could be under the influence of alcohol or drugs. She told defendant to "'stop'" and she tried to get the key out of his hand. Defendant tried to push her hand away. He was slapping her arm, but not very hard. Defendant said to Ms. Okusa, "'Give me money.'" Ms. Okusa tried to diffuse the situation. She told defendant: "'Hold on. My friend is inside.'" She also said, "'Wait a minute.'" Defendant put the van in gear and crashed into a pole that was directly in front of them. Ms. Ishimoto came out of the bank. Defendant then put the van in reverse and tried to back up. Ms. Okusa remained very fearful. She thought defendant would take the vehicle and her in it. She jumped out of the van in a hurry out of fear and hit the car that was parked immediately to the right. Defendant backed out of the parking space and drove off down the street. Ms. Okusa thought defendant's behavior was odd in that: "It is 3:00 o'clock in the afternoon and a bank full of people. He's trying to take a car." On cross-examination, Ms. Okusa said she had told an investigator that defendant appeared to be "drunk" or on drugs.

Ms. Ishimoto testified she had been inside the bank for about five minutes, waiting to make a deposit, when she heard the sound of a car crashing. She looked outside and saw that her car had hit a pole. She went outside immediately. She saw defendant sitting in the driver's seat. As Ms. Ishimoto started running towards the van, Ms. Okusa jumped out, hit the car next to it, and started rolling. Ms. Ishimoto's van was driven quickly down the street. When Ms. Ishimoto later saw her van, the license plates were missing, there was a beer can lying on the driver's seat and its interior was in disarray.

Los Angeles Police Officer Francisco Martinez and a partner were working on June 27, 2007, at about 7:30 in the evening. Officer Martinez observed a blue Honda Odyssey van. The van had no license plate on the front and looked like it had two flat tires. The van passed Officer Martinez and turned right, going the wrong way on a one-way street. Officer Martinez followed the van until it stopped along the curb. Officer Martinez's partner activated the patrol car's red lights. Defendant, the driver, exited the van and was looking at the tires. Officer Martinez approached. Defendant started talking

to Officer Martinez. Defendant was: "very talkative" and "'rambling on'"; would not keep quiet; but was making sense. He kept saying over and over: "'I'm having a seizure. I'm having a seizure.'" Officer Martinez called the paramedics. Officer Martinez's partner ran the van's vehicle identification number. Officer Martinez's partner discovered the van had been taken in a carjacking about four hours earlier. Defendant was arrested. Defendant continued to repeat the same things he had been saying previously. Defendant fit the description of the carjacking suspect. Officer Martinez had earlier told defense counsel that defendant had appeared incoherent and did not look normal; further, he was wearing a medical alert necklace. Defendant's appearance was similar to a person having a diabetic seizure or under the influence of crack cocaine. Officer Martinez called for the paramedics because defendant said he was having a seizure. No weapons were recovered from the van.

2. Defense

Defendant's mother, Margaret Flores, testified he injured his head in 2002 and thereafter his behavior was very different. He would start talking about one thing, and then switch to something else, and he did not make sense. According to Ms. Flores: defendant had seizures and sweated; he was supposed to take anti-seizure medicine; he acted better on some days; he acted more appropriately when he took his medication; and when he failed to take his medication, he was more likely to act inappropriately. After defendant injured his head, according to Ms. Flores, he fell more often than he had before the injury. Once, Ms. Flores had to call the paramedics after an injury caused by a fall. Defendant would become frustrated when he could not do certain tasks or could not articulate what he wanted to say.

In the weeks prior to his arrest, defendant's behavior had changed. He was very nervous, "very like up and down," and he did not know what to do. He was hospitalized overnight. Ms. Flores testified his seizure activity increased.

Defendant had lived with his mother since December 2005. He received social security funds and had access to a car. But when cross-examined, Ms. Flores testified that because of his seizure disorder, defendant was not allowed to drive a vehicle. He was not supposed to drink alcohol, because of his medication. On the day defendant was arrested, he left home around two in the afternoon. He did not say where he was going. Sometimes defendant lied to his mother about taking his medication. Ms. Flores testified he was getting tired of taking the medication. When defendant had a seizure he would start shaking all over, "very noticeably"; his whole body would shake—legs, body, arms. When the seizures ended, defendant would have trouble talking and could not remember what had happened. Ms. Flores's other son, Gilbert Flores, watched defendant for her. Gilbert continued to do so until he passed away in July 2006.

Dr. Wayman Blakely, a psychiatrist, had treated defendant about once a month in the Department of Corrections and Rehabilitation's out-patient clinic from December 27, 2005, until January 8, 2007. Dr. Blakely treated defendant for psychiatric issues and prescribed medications for psychotic symptoms and depression. Dr. Blakely also prescribed mood stabilizers. The stabilizers were used to treat seizures as well as to stabilize mood. The medications defendant took varied over time but included: Paxil, for depression; Abilify and Seroquel for psychotic symptoms (e.g., hearing voices, seeing things, disorganized or illogical thinking, trouble concentrating); Depakote-extended release, for mood stabilization; and Dilantin, an anti-seizure medication. Failure to take the Dilantin, even for a day, can result in generalized seizure, loss of consciousness. Defendant was suffering from one of several forms of bipolar disorder. Impulsive action is one characteristic of this illness. Defendant said he had been beaten up in prison and had suffered a head injury and as a result he suffered repetitive seizures. According to Dr. Blakely, if a person were to stop taking medication for psychotic symptoms: hallucinations would reappear; a person's thought processes could become fragmented; and his or her thinking illogical. If a person were to stop taking mood stabilizers, he or she would start to experience wild swings of mood.

The last time Dr. Blakely saw defendant as a patient was on January 8, 2007. Defendant was alert and his thinking was reasonably organized—he was making sense. His behavior was not out of the ordinary. As noted, Dr. Blakely saw defendant on an ongoing basis. Defendant had intact thought processes with the exception of November 2006. Every month, except November 2006, defendant was alert, oriented, did not express suicidal or homicidal thoughts and was not irritable.

On November 16, 2006, however, defendant had "somewhat . . . fragmented thought processes" and occasionally spoke with pressured speech. Pressured speech is a symptom seen when a person with bipolar illness is not being adequately treated. In his November 16, 2005 report, Dr. Blakely wrote: "'Patient says he has, quote, unquote, anger issues [that] have been made worse over the last month. He is vague as to exactly what the situation is. Also, is being giving anti-seizure medication by Lexipro . . . , which is a medicine for depression. But he still hears voices and can't relax.'" On January 8, 2007, Dr. Blakely reported: "'[Defendant] says he's been taking 1000 milligrams of Seroquel in divided doses and feels, quote, unquote, more relaxed. But then discloses he feels dizzy when he stands up sometimes. Other medications okay.'" Most people do not take more than 800 milligrams of Seroquel a day. After he was beaten up in prison, defendant felt anxious and paranoid about being attacked.

Defense counsel provided Dr. Blakely with a report from University Medical Center, Department of Medical Records, with an admission date of January 15, 2002. Dr. Blakely had not previously seen the report. The report reflected that defendant was treated for an intracranial hemorrhage with septic embolization to the brain and to the lungs. These were serious complications—"staphylococcus urease," which is a staph infection. Defendant had suffered a brain injury in his temporal lobe. Such an injury can cause seizures, which can be violent at times. On redirect examination, Dr. Blakely described defendant, in psychiatric terms, as "a seriously ill" man. Mixing alcohol with defendant's medications would potentially have side effects.

Dr. Roger Light was a clinical neuropsychologist with a specialty in brain injuries and rehabilitation. Dr. Light was appointed to evaluate defendant. Dr. Light described

defendant's medical history as including an intracerebral hemorrhage, bleeding on the brain, which required neurosurgery. Defendant had a craniotomy scar. Defendant's injury was to a part of the brain responsible for language function. According to the medical records, in 2005, defendant had a seizure and suffered a fall; he struck his head and was unconscious for 10 hours. He had subdural bleeding inside the skull. The subdural bleeding was in the same part of the brain as the earlier injury. The repeated blows to the head, the surgery, and the seizures all caused damage. Medical records from Los Angeles County Hospital-U.S.C. Medical Center, dated June 25 and 26, 2007, two days prior to defendant's arrest, indicated he had again suffered a fall and hit his head. The fall could have been caused by a seizure. And even in the period of time between active seizures, the seizure activity can impact behavior. Anyone who has had a brain injury should avoid alcohol; it kills brain cells and can make seizures more likely.

There was conflicting information regarding the cause of defendant's 2002 injury. Defendant said he was injured in a beating. But there was no medical documentation of bruising or trauma. And there were other indications defendant's brain injury was the result of infection. Defendant had twice injured a similar area of the brain—in 2002 and in 2005. According to medical records, defendant had been hospitalized for about four months, from January to April 2002. Dr. Light testified, "[This] is a phenomenally long time to be in the hospital." Dr. Light believed defendant had a severe cognitive disorder. A person who suffers from seizures sometimes has memory gaps, called ictal personality issues, between seizures. A person can engage in complex behaviors—driving, interacting with their environment, talking to people—and have no recollection of it later. A person suffering a seizure can actually be in a delirium state, confused and disoriented but still talking and interacting. A person in that condition could very easily appear to be incoherent, disoriented. Such a person might look like they were under the influence of alcohol or a controlled substance. For that reason, Dr. Light advised his brain injury patients to get a medical alert bracelet indicating their diagnosis.

The parties stipulated: "[O]n the evening of June 27, 2007, [defendant] was taken to L.A. County USC Hospital at the request or with the assistance of Officer Martinez

who testified that he was seen by Dr. Feizbaksh . . . and that [defendant] was observed to have no trauma and alcohol on his breath[.]" The parties further stipulated: "[T]he prosecutor, [Steven Dickman], had an interview with Ms. O[k]usa yesterday morning without the aid of a Japanese interpreter in [Mr. Dickman's] office and that Ms. O[k]usa made a statement in English that [defendant] was—something to the effect that [defendant] was not quite there or not all there[.]"

B. Intent Instruction

With respect to the substantive offense, the jury was instructed: "The crime charged in this case requires proof of the union, or joint operation, of act and wrongful intent. [¶] For you to find the person guilty of the crime of carjacking, as charged in count 1, that person must not only intentionally commit the prohibited act, but must do so with a specific intent. The act and the specific intent required are explained in the instruction for that crime." The jury was further instructed: "To prove that the defendant is guilty of [carjacking], the People must prove that: [¶] One, the defendant took a motor vehicle that was not his own; [¶] Two, the vehicle was taken from the immediate presence of a person who possessed the vehicle or was its passenger; [¶] Three, the vehicle was taken against that person's will; [¶] Four, the defendant used force or fear to take the vehicle or to prevent that person from resisting; and, [¶] Five, when the defendant used force or fear to take the vehicle, he intended to deprive the other person of possession of the vehicle either temporarily or permanently. [¶] The defendant's intent to take the vehicle must have been formed before or during the time he used force or fear. If the defendant did not form this required intent until after using the force or fear, then he did not commit carjacking."

C. The New Trial Motion

After the jury's guilty verdict, defendant sought a new trial on the ground of jury misconduct. Defendant asserted, "Specifically, jurors in this case *twice* refused to deliberate prior to voting, threatened to not return to jury service if they didn't get their way, bullied other jurors who disagreed with their 'opinion' about the case, and spoke about the status of the deliberations outside the province of the jury room."

Declarations filed in support of defendant's new trial motion established the following. Jury deliberations began at four o'clock on a Friday afternoon, February 29, 2008. The jury chose a foreperson; one of the jurors volunteered to serve as foreperson. The foreperson immediately asked whether anyone had already formed an opinion as to guilt or innocence. The foreperson took a vote count. Juror A.A. declared as follows. She was the lone not guilty vote. There had been no discussions of the facts, the law, or the jury instructions when the initial vote was taken. Then, the bailiff told the jury that court had concluded for the day. The bailiff stated jury deliberations would have to continue on Monday. Some jurors said they were ready to announce a verdict. Ms. A. suggested there should first be a discussion of the evidence. Several jurors gave Ms. A. dirty looks. The bailiff said the jury would in any event have to return to deliberate on Monday. After the bailiff left the room, some jurors stated strongly that they wanted everyone to stay and return a verdict, they "'wanted this to be over'" in Ms. A.'s words. Ms. A. said they should return on Monday and deliberate. Discussion shifted to a return time. Following a 30 minute discussion, they agreed on 9:30 a.m. They adjourned for the day without ever discussing the facts or the law. According to B.Y., a juror, following the initial vote: "[S]ome jurors discussed the reasons for their vote. The jurors also discussed what time to convene on Monday. After a meeting time was decided, the jurors finished for the day."

On the following Monday, March 3, 2008, all but one juror returned on time. At approximately 11:30 a.m., the alternate juror, S.B., was seated. The foreperson again asked for a vote before any deliberation. Ms. A. voted not guilty. Ms. A. said she asked

the other jurors to at least discuss the jury instructions. A male juror seated next to Ms. A. said: "'[Y]ou're just wasting our time. We'd be done if it weren't for you. You're getting off on this.'" Ms. A. responded, "'I am most certainly not enjoying this, but we are supposed to deliberate.'" Two jurors seemed sympathetic to what Ms. A. was saying. But the remaining jurors either ignored her or made faces, rolled their eyes, or looked away, according to Ms. A. Ms. A. declared, "At this point the jury began to discuss the case." As the noon hour approached, the jurors realized they would have to return after lunch. Ms. A. told her fellow jurors she thought they should go through the evidence after lunch; she thought there was still a reasonable doubt about defendant's guilt. The bailiff said the jury would have to break for lunch. A female juror "slammed her hands" on the table, stood up and declared: 'I'm not coming back from lunch. It's obviou[s] he's guilty and she's not going to change her mind, and there's no point in coming back.'" Another female juror said: "'Wait a minute. You're not being respectful of our time. It's like we've wasted the whole day.'" The first juror replied: "'I'm not being disrespectful, because I'm telling you I'm not coming back. If I wanted to be disrespectful, I wouldn't tell you. I just wouldn't come back.'" She stormed out of the room. A juror asked the bailiff whether the departing juror would be held in contempt of court if she did not return and he said yes. The juror then yelled in the departing juror's direction, "'You'll be held in contempt of court!'" As the remaining jurors left the jury room, Ms. A. stayed behind because she was crying and she did not want the others to see her crying. Ms. A. overheard two jurors discussing whether they should go after the angry juror and make her come back. One said, "'I don't know what we are going to do. She has a karate shirt on.'" Ms. A. declared: "These comments, and the angry juror's hostility toward me, made me feel unsafe. I went into the restroom to avoid seeing the other jurors on the elevator. I saw [Ms. B.] in the restroom. She told me, 'Don't let this stuff intimidate you, you're doing the right thing.'"

Mr. Y. declared that following the second vote, with the alternate juror seated: "The foreman asked jurors to say why they voted the way that they did, and why they thought [the defendant] was guilty. Everyone had a chance to express themselves. [¶]

After [Ms. A.] talked about why she believed the defendant was not guilty, some jurors became annoyed. [¶] Some jurors were visibly irritated. . . . Some people were pouting and sighing, talking to neighbors about [Ms. A.]. [¶] [Ms. A.] had a problem with the intent of the defendant being hard to prove. . . . Another vote was taken before lunch, with the same results. [¶] As we prepared to break for lunch, [one juror] was really annoyed. She stood up threatening not to come back. She said, "'I'm not coming back because you're wasting my time!' People were upset with [the angry juror], because she said she wasn't coming back, and there were no more alternates."

Ms. B., the alternate juror, declared that after she was seated and the vote was taken without prior deliberation, she indicated she was undecided; she explained to her fellow jurors she was not sure intent had been proven. Ms. B. declared: "Approximately two other jurors questioned intent as well. As this discussion began, some jurors were disrespectful. Two in particular stood out. [¶] They made statements there were not constructive. A male juror told a female juror who voted not guilty, 'I think you're getting off on this.' The woman was verbally attacked. [¶] I was upset. . . . I told him we needed to respect her and other people agreed. He did not like her because she was 'wasting their time.' [¶] [When the bailiff announced the lunch break], a Hispanic female juror stood up and announced she was not returning. She said, 'I just want you all to know I'm not coming back! That one over there (female juror who voted not guilty) has been doing this since Friday, and she's not going to vote guilty. There's nothing else to discuss!' [¶] I noticed that [Ms. A.] was crying in the bathroom. I tried to console her and told her to stick it out."

All of the jurors returned after lunch. Mr. Y. declared: "The group went over jury instructions . . . . The jurors went over the information again, and the juror who voted not guilty, changed her vote to guilty." Ms. A. said the jurors "talked briefly about some of the issues" in the case. Ms. A. declared: "There was so much hostility towards me that I felt defeated. The angry juror threatened to not return after lunch because I wasn't going along with the group. [¶] I felt intimidated. I went along with the rest of the group in

order to end the process. I changed my vote to guilty." The jury returned its guilty verdict at 2 p.m. on Monday, March 3, 2008.

Ms. B. described what occurred after lunch on Monday as follows: "After lunch, [Ms. A.] told the jury that she was undecided. She said if we go through to the end of the day (Monday) and I don't have a decision, '. . . I promise you I will have a decision by the end of the day.' [¶] . . . [¶] I [the alternate juror] changed my mind based on understanding intent better. The jury instructions were read out loud. Three people walked [Ms. A.] through it. When a vote was taken again [Ms. A.] voted guilty."

On the day after the verdict, Ms. A. telephoned defense counsel, Gregory P. McCambridge. Ms. A. declared: "I came forward because I feel tremendous guilt for not fighting harder for a different verdict. I did not send a note to the judge because I did not want people to become more hostile towards me. [¶] I still have a doubt as to the defendant's guilt based on his mental deprivation. I believe he is not guilty. [¶] I also feel that the court should be aware of how the jury did not follow the Judge's instructions about deliberating before voting, and not making up your mind until you have had a chance to deliberate." Ms. A. told Mr. McCambridge she "was upset about how members of the jury conducted themselves" during deliberations. Mr. McCambridge related his conversation with Ms. A.: "[S]he felt 'bullied' by 'hostile' jurors who seemed intent on not deliberating at all about the facts and the law[,]"; "she regretted her decision to go along with the majority and vote guilty"; and "she believed [defendant] was not guilty based on his mental impairment." Mr. McCambridge's investigator was directed to secure a more detailed statement from Ms. A. Also, on March 18 or 19, 2008, Mr. McCambridge spoke to the bailiff. Mr. McCambridge spoke to the bailiff about Ms. A.'s revelations. The bailiff responded, "'So that's what was going on . . .'." The bailiff said he entered the jury room to excuse the jurors for lunch. The bailiff saw one juror was crying and another was yelling. Mr. McCambridge declared: "[The bailiff] told me that the juror who was yelling was threatening not to come back after the lunch hour. [The bailiff] described the jurors as arguing with raised voices. [The bailiff] confirmed that it was [Ms. A.] who was crying."

The trial court found the declarations presented did not show there was any juror misconduct. The trial court ruled: "[I] think at most what you have is what normally goes on during jury deliberations, including one of the jurors is obviously upset. . . . [A]lthough the jurors did not deliberate for a particularly long period of time, I think the evidence that I saw, as reflected in the declarations, indicate that there was some deliberation. There was a discussion of the jury instructions, particularly with regard to the Monday date."

III. DISCUSSION

A. Sufficiency Of The Specific Intent Evidence

Section 215, subdivision (a) states: "'Carjacking' is the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear." (*People v. Hill* (2000) 23 Cal.4th 853, 858-859.) Defendant contends there was insufficient evidence he had the requisite specific intent to permanently or temporarily deprive the victim of the vehicle. On appeal, we must determine, without reweighing the evidence, whether there was sufficient evidence to permit a rational jury to find the element of intent beyond a reasonable doubt. (*People v. Lewis* (2001) 25 Cal.4th 610, 642; *People v. Salgado* (2001) 88 Cal.App.4th 5, 15.) In so doing, we view the evidence in the light most favorable to the judgment. (*People v. Hatch* (2000) 22 Cal.4th 260, 272; *People v. Lewis, supra,* 25 Cal.4th at p. 642; *People v. Johnson* (1980) 26 Cal.3d 557, 578; *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.) Specific intent may be proved by circumstantial evidence. (*People v. Lewis, supra,* 25 Cal.4th at pp. 643, 644; *People v. O'Dell* (2007) 153 Cal.App.4th 1569, 1577; see CALJIC No. 2.02.)

Defendant argues the evidence established: he did not specifically intend to deprive Ms. Okusa of Ms. Ishimoto's van; he was physically incapable of doing so; in her

testimony, Ms. Okusa described a man who "was not even aware of her presence, was not able to properly perform basi[c] tasks required to operate a vehicle, was confused and disoriented, and was acting like a man under the influence of drugs or alcohol"; this description was consistent with other evidence of his medical condition and symptoms. Finally, Ms. Okusa's observations dovetailed with Officer Martinez's testimony as to defendant's impaired physical condition. Defendant concludes, "The totality of the evidence supports but one reasonable conclusion, that [defendant] not only did not possess but would have been unable to form the specific intent to commit the carjacking." Defendant argues this conviction on insufficient evidence violated his due process rights under the Sixth and Fourteenth Amendments to the United States Constitution, and article I, section 5 of the California Constitution.

Substantial evidence supported the jury's determination defendant specifically intended to deprive Ms. Okusa of possession of Ms. Ishimoto's van either temporarily or permanently. He jumped into the van in a hurry and tried to start the vehicle even though it was already running. When Ms. Okusa tried to grab the ignition key, defendant batted her hand away. He demanded money. He drove the van into a pole, then backed out and sped away. That defendant was in a hurry to move the van out of the parking lot, ignored Ms. Okusa's command that he stop, resisted her physical attempt to stop him, and demanded money was substantial evidence defendant specifically intended to deprive Ms. Okusa of possession of Ms. Ishimoto's van. When the van was recovered, in defendant's possession, the license plates had been removed; hence the jury could reasonably infer defendant removed the plates to hide the van's identity. Ms. Okusa thought defendant might be drunk or high, not that he was mistaken about or not conscious of what he was doing. Both Ms. Okusa and Officer Martinez testified defendant was making sense when he spoke. The testimony of Ms. Flores, Dr. Blakely, and Dr. Light and the stipulated to evidence does not compel a conclusion defendant was incapable of forming the requisite intent. Nor was there any conclusive evidence defendant's mental condition at the time he took Ms. Ishimoto's van was such that he did not know or was incapable of understanding what he was doing.

B. Juror Misconduct

As noted above, defendant sought a new trial on juror misconduct grounds. (§ 1181, subd. 3; *People v. Ault* (2004) 33 Cal.4th 1250, 1260; *People v. Jones* (1998) 17 Cal.4th 297, 316.) Every defendant has a constitutional right to a trial by an unbiased, impartial jury. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16; *Irvin v. Dowd* (1961) 366 U.S. 717, 722; *In re Hitchings* (1993) 6 Cal.4th 97, 110.) The Supreme Court has held: "A defendant is 'entitled to be tried by 12, not 11, impartial and unprejudiced jurors. "Because a defendant charged with a crime has a right to the unanimous verdict of 12 impartial jurors [citation], it is settled that a conviction cannot stand if even a single juror has been improperly influenced." [Citations.]' (*People v. Holloway* (1990) 50 Cal.3d 1098, 1112, disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)" (*People v. Harris* (2008) 43 Cal.4th 1269, 1303; accord, *People v. Danks* (2004) 32 Cal.4th 269, 325.)

A trial court must perform a three-step analysis in ruling on a new trial motion based on juror misconduct allegations. The Court of Appeal has explained: "The court must first determine whether the affidavits supporting the motion are admissible under Evidence Code section 1150[, subdivision] (a). If the evidence is admissible, the court must then consider whether the facts establish misconduct. (*Krouse v. Graham* (1977) 19 Cal.3d 59, 79-82.) Finally, assuming misconduct, the court must determine whether the misconduct was prejudicial. (*People v. Marshall* (1990) 50 Cal.3d 907, 949; *People v. Miranda* (1987) 44 Cal.3d 57, 177[, disapproved on another point in *People v. Marshall, supra*, 50 Cal.3d at p. 933, fn.4].) A trial court has broad discretion in ruling on each of these questions and its rulings will not be disturbed absent a clear abuse of discretion. (*People v. Montgomery* (1976) 61 Cal.App.3d 718, 728-729.)" (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 255 fn. omitted; accord, *People v. Duran* (1996) 50 Cal.App.4th 103, 112; *People v. Hord* (1992) 15 Cal.App.4th 711, 724.)

When, as here, alleged jury misconduct during deliberations is raised by a new trial motion, the jurors themselves are competent to prove the objective facts. (*In re Stankewitz* (1985) 40 Cal.3d 391, 397; *People v. Hutchinson* (1969) 71 Cal.2d 342, 351.) But, as our Supreme Court has held: "'No evidence is admissible to show the effect of [statements, conduct, conditions, or events in the jury deliberation process] upon a juror either in influencing him [or her] to assent to or dissent from the verdict or concerning the mental processes by which it was determined.' (Evid. Code, § 1150, subd. (a), ...) Thus, jurors may testify to 'overt acts'—that is, such statements, conduct, conditions, or events as are 'open to sight, hearing, and the other senses and thus subject to corroboration'—but may not testify to 'the subjective reasoning processes of the individual juror . . . .' (*People v. Hutchinson, supra*, [71 Cal.2d] at pp. 349-350.)" (*In re Stankewitz, supra*, 40 Cal.3d at pp. 397-398.) Our Supreme Court has explained: "'[W]hen a juror in the course of deliberations gives the reasons for his or her vote, the words are simply a verbal reflection of the juror's mental processes. Consideration of such a statement as evidence of those processes is barred by Evidence Code section 1150.' (*People v. Hedgecock* [(1990)] 51 Cal.3d [395,] 418-419.)" (*People v. Duran, supra*, 50 Cal.App.4th at pp. 112-113.)

We review the trial court's order denying a new trial for an abuse of discretion. (*People v. Dykes* (2009) 46 Cal.4th 731, 809; *People v. Carter* (2005) 36 Cal.4th 1114, 1210; *People v. Hayes* (1999) 21 Cal.4th 1211, 1260-1261; but see *People v. Nesler* (1997) 16 Cal.4th 561, 582 (plur. opn. of George, C.J.).) We must accept the trial court's factual findings and credibility determinations if supported by substantial evidence, but exercise independent judgment whether any misconduct was prejudicial. (*People v. Dykes, supra*, 46 Cal.4th at p. 809; *People v. Tafoya* (2007) 42 Cal.4th 147, 192.) Our Supreme Court has held: "A trial court's ruling on a motion for new trial is so completely within that court's discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion. (*People v. Delgado* (1993) 5 Cal.4th 312, 328.)" (*People v. Hayes, supra*, 21 Cal.4th at pp. 1260-1261.)

We find no basis for reversal on juror misconduct grounds. First, that the foreperson twice called for a vote without *first* discussing the facts and the law—at the outset of deliberations, and following a juror's replacement with the alternate—does not detract from the undisputed fact the jury *did* deliberate. (See CALJIC No. 17.40 ["Each of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with the other jurors"]; § 1128 [jury may decide in court or retire to deliberate].) There was evidence that following the initial vote, late on a Friday afternoon, some jurors discussed the reasons for their votes. On the following Monday, after the alternate juror was seated, and a second vote was taken, the foreman asked the jurors to explain their votes and the evidence demonstrates "everyone had a chance" to express themselves. There was a discussion about whether intent had been established and the jurors reviewed and discussed the instructions on that point.

Second, Ms. A.'s declaration was inadmissible insofar as it described her subjective reasoning process and the effect of conduct by other jurors on her decision-making process: "[certain] comments, and the angry juror's hostility toward me, made me feel unsafe"; "[t]here was so much hostility towards me that I felt defeated"; "I felt intimidated"; "I went along with the rest of the group in order to end the process"; and "I believe he is not guilty." (Evid. Code, § 1150, subd. (a); *People v. Dykes, supra,* 46 Cal.4th at p. 812; *People v. Lindberg* (2008) 45 Cal.4th 1, 53; *People v. Danks, supra,* 32 Cal.4th at pp. 301-302; *People v. Steele* (2002) 27 Cal.4th 1230, 1260-1261, 1264; *People v. Hedgecock, supra,* 51 Cal.3d at p. 419; *People v. Hutchinson, supra,* 71 Cal.2d at p. 349.) Mr. McCambridge's declaration was likewise inadmissible to the extent it described Ms. A.'s subjective reasoning process: "she felt 'bullied' by 'hostile' jurors who seemed intent on not deliberating at all"; "she regretted her decision to go along with the majority and vote guilty"; "she believed [defendant] was not guilty based on his mental impairment." (*Ibid.*)

Third, evidence other panelists treated Ms. A. badly also does not suffice to impeach the verdict. (*People v. Keenan* (1988) 46 Cal.3d 478, 539-542; *People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1087; *People v. Orchard* (1971) 17 Cal.App.3d 568, 572-

574; see *People v. Engelman* (2002) 28 Cal.4th 436, 446; *People v. Cleveland* (2001) 25 Cal.4th 466, 475-476.) There was evidence Ms. A.'s co-jurors: gave her dirty looks; ignored her, made faces, rolled their eyes; became annoyed; were visibly irritated with her; told her, "'[Y]ou're just wasting our time'"; pouted, sighed, talked to their neighbors about her; threatened not to return to the jury room after lunch; stormed out of the jury room; were disrespectful; and made comments that were not constructive. This conduct, while harsh and inappropriate, is not prejudicial misconduct that impeaches the verdict. (*People v. Keenan, supra,* 46 Cal.3d at p. 541; *People v. Ybarra, supra,* 166 Cal.App.4th at p. 1087; see *People v. Engelman, supra,* 28 Cal.4th at p. 446; *People v. Cleveland, supra,* 25 Cal.4th at pp. 475-476.) As the Supreme Court explained in *Keenan,* harsh and inappropriate conduct, expressions of frustration, temper, and strong conviction against others' views are sometimes part of the deliberative process and are not a basis for reversal. (*Id.* at p. 541.) Fourth, Ms. A. never made any effort to apprise the trial court of the behavior in the jury room. (*People v. Keenan, supra,* 46 Cal.3d at p. 542.) We find no basis for reversal.

IV. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

We concur:

ARMSTRONG, J. KRIEGLER, J.